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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/538,261	12/09/2005	Bernd Ullmann	1604BPE-6	3296
23442	7590	03/02/2010		
SHERIDAN ROSS PC 1560 BROADWAY SUITE 1200 DENVER, CO 80202			EXAMINER YAGER, JAMES C	
			ART UNIT	PAPER NUMBER
			1794	
			MAIL DATE	DELIVERY MODE
			03/02/2010 PAPER	

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/538,261

Applicant(s)

ULLMANN, BERND

Examiner

JAMES YAGER

Art Unit

1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 26 October 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-25 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-25 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/SB/CD)
Paper No(s)/Mail Date 20091015 & 20091104
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Response to Amendment

1. The amendment filed 26 October 2009 has been entered. Claims 1-25 are currently pending in the application. The rejections of record from the office action dated 24 June 2009 not repeated herein have been withdrawn.

Claim Objections

2. Claim 1 is objected to because of the following informalities: "gas-pressurize" in line 10 should be "gas-pressurized". Appropriate correction is required.

Claim Rejections - 35 USC § 112

3. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

4. Claims 1-25 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed,

had possession of the claimed invention. There does not appear to be support to recite a "cylindrical body" and a "cylindrical positioning device". Applicant points to page 12 line 12 of the specification which states "that the geometry of the insert according to the present invention may, of course, also be different, e.g., with a square, rectangular or polygonal horizontal projection or also asymmetrical in relation to the axis x." This does not appear to provide support for a "cylindrical body" or "cylindrical positioning device". Examiner cannot find and Applicant has not pointed to any support to recite "partition that can be opened by the gas pressurized liquid". There is no support to recite that the body and said positioning device are made of a material with a specific gravity of >1 .

5. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

6. Claims 1-25 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Regarding claim 1, the phrase "positioning device that is associated with said body" renders the claim indefinite because it is not clear what is meant by associated. Does Applicant mean to recite "attached to"?

Regarding claim 1, the scope of the claim is confusing because it is not clear if the at least one opening that connects said at least one cavity with the headspace of the liquid container is part of the positioning device or the body. Based on the instant figures, Examiner is interpreting it as part of the body.

Regarding claims 3 and 4, claim 3 recites that the positioning device has the shape of a partially covered boat. It is unclear what is meant by this since boats can be in many different shapes.

Regarding claims 3 and 4, the phrase "partially covered" renders the claims indefinite because it is unclear how much or how little coverage is needed to be considered partially covered.

Regarding claim 4, claim 4 refers to a "boat". This renders the claim indefinite because the claim does not recite a "boat", but recites a positioning device in the shape of a partially covered boat.

Regarding claim 4, the phrase "wherein said boat further comprises said body". This renders the claim indefinite because it is unclear because the claim appears to recite that the positioning device comprises said body. However, the positioning device and the body are separate entities as set forth in claim 1. Examiner is interpreting this to mean that the insert comprises said body. Clarification is requested.

Regarding claim 6, the phrase "has only one said opening an upper surface thereof" renders the claim indefinite because it is unclear what is meant by this phrase.

Regarding claims 19-21, Claims 19-21 recite the limitation "the liquid". There is insufficient antecedent basis for this limitation in the claims.

Regarding claim 7, the phrase "in an upper surface thereof" renders the claim indefinite because it is unclear what is meant by this phrase.

Regarding claim 7, the phrase "opened by the gas-pressurized liquid" renders the claim indefinite because it is not clear how a gas-pressurized liquid opens a partition.

Regarding claim 22, the phrase "said cavity" renders the claim indefinite because it is not clear which cavity is being referred to, the first cavity or the second cavity?

Claim Rejections - 35 USC § 102

7. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

8. Claims 1-6, 11-14, 16 and 18-21 are rejected under 35 U.S.C. 102(b) as being anticipated by Nash et al. (US 5,714,186).

Regarding claims 1-6, 11-14 and 19-21, Nash discloses a head generating device comprising a capsule with two compartments that may be cylindrical in shape (i.e. insert for being added to a gas-pressurized liquid in a liquid container, the liquid container also having a headspace) (Fig. 1, 14 and 16, abstract), wherein the first compartment (Fig. 1, 14) will pressurize (i.e. a cylindrical body that is activated by pressure having at least one cavity) (C5/L59-67) and beer will enter the second compartment (i.e. a cylindrical positioning device) (C6/L1-6; Fig. 1, 16), wherein the first compartment has a small opening which is above the level of the liquid (i.e. at least one opening that connects said at least one cavity with the headspace of the liquid container) (Fig. 2, top of tube 20), wherein the second compartment has a small opening (i.e. an opening that is submerged in the gas-pressurized liquid when said

insert is floating on the gas pressurized liquid) (Fig 1 and 2, 28) and an additional opening (i.e. ventilation opening that directly communicates with the headspace) (Fig. 2, 30) and a compartment (i.e. a volume that ensures that the insert will sink into the gas-pressurized liquid when said volume is filled with the gas-pressurized liquid) (Fig. 1, 16).

It is the Examiner's position that given that the first and second compartments are adjacent to each other, the second compartment (positioning device) (Fig. 1, 16) is arranged outside the first compartment (body) (Fig. 1, 14).

Given that the shell of the capsule comprises the bottoms of both the first and second compartments, it is the Examiner's position that the bottom of the body and the bottom of the positioning device form an integral unit.

Given that the first compartment (body) has only one cavity and only one small opening (top of tube 20, Fig. 2) at the top of the first compartment, it is the Examiner's position that the capsule meets the limitations of claim 6.

Given that the first and second compartments are roughly shaped like half cylinders that are aligned to create a cylindrical capsule (C5/L9-14), it is the Examiner's position that they are designed as symmetrical bodies in relation to an axis and are cylindrical.

Nash further discloses a weight which may be affixed to the interior of the cylinder (i.e. further comprising a weight positioned within said cavity of said body; wherein said weight is an integral part of the said body) (C6/L22-26; Fig. 2, 34).

Regarding claims 3 and 4, it is the Examiner's position that given that the second compartment has a covered top part, the second compartment has the shape of a

partially covered boat, and that the second compartment (positioning device) comprises a bottom a wall and a cover (Fig. 1 and 2).

Regarding claims 14 and 16, It is noted that the reference teaches a cylinder having a bottom (i.e. bottom part) and having a top (i.e. cover part) and a weight (Fig. 1 and 2). Given that the shell of the capsule (Fig. 1 and 2, 10) comprises the walls of the first and second compartments, it is the Examiner's position that the bottom and top (i.e. two parts) are connected to one another via side walls thereof.

Regarding claims 19-21, Nash discloses that the capsules are inserted in containers the can is dosed with liquid nitrogen and the lid is affixed and sealed, the cans have been previously filled with beverage (C6/L39-45; C7/L23-26), the capsule is used to create a head on a beverage such as beer (C1/L4-7), the interior of the capsule will be pressurized by gas in the headspace above the liquid and the trapped gas is able to exit the capsule when the container is opened and the pressure in the container drops (C2/L26-33) (i.e. use of an insert to improve the formation of gas bubbles in a gas-pressurized liquid, during the opening of the container, characterized in that the insert is introduced into the container after the open container is filled with the gas-pressurized liquid and the liquid container is sealed, such that an overpressure develops compared to the ambient pressure within the liquid container after sealing; wherein pressure which causes the overpressure to develop within the liquid contain container sealing, is admitted to the headspace above the liquid in the liquid container; wherein the liquid is a foaming beverage)

Claim Rejections - 35 USC § 103

9. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

10. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

11. Claims 10 and 18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Nash et al. (US 5,714,186) as applied to claim 1 above.

Regarding claim 10, it is the Examiner's position that given that the first and second compartments comprise half spheres or half cylinders adjacent to each other forming the shape of a sphere or a cylinder, that the first compartment (body) is arranged centrally to the floating body.

Nash does not disclose that the body is arranged in the positioning device.

However, since it has been held that rearranging parts of an invention involves only routine skill in the art while the device having the claimed dimensions would not perform differently than the prior art device, In re Japikse, 86 USPQ 70, it is the

Examiner's position that it would have been obvious to arrange the body that can be activated by pressure in the positioning device and the capsule would not perform differently.

Regarding claim 18, given that capsule is intended to submerge (C6/L22-26), it is the Examiner's position that it would have been obvious to one of ordinary skill in the art at the time the invention was made to make the body and the positioning device of a material with a specific gravity of >1 to further promote submerging the capsule.

12. Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over Nash et al. (US 5,714,186) as applied to claim 1 above, in further view of Grieshaber et al. (US 1,567,050).

Regarding claim 10, it is the Examiner's position that given that the first and second compartments comprise half spheres or half cylinders adjacent to each other forming the shape of a sphere or a cylinder, that the first compartment (body) is arranged centrally to the floating body.

Nash does not disclose that the body is arranged in the positioning device.

Grieshaber discloses that conventionally submarines have ballast tanks along the hull, and are positioned around the outside of the inner compartment as shown in figure 1 (P1/L18-29, Fig. 1).

Nash and Grieshaber are analogous art because they both teach about structures that float on and submerge in liquids. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to use the design of Greishaber regarding the placement of the first compartment in or within the second

compartment in the capsule of Nash because that is the conventional design used in submersible devices and to provide increased stability to the structure.

13. Claims 7-9 and 22-25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Nash et al. (US 5,714,186), in view of Reichinger (WO 99/54229).

Regarding claims 7-9 and 22-25, Nash discloses all of the claim limitations as set forth above. It is the Examiner's position that the cavity of the first compartment is the first cavity and the small opening (top of tube 20, Fig. 2) is the opening in an upper surface thereof.

Nash does not disclose a second cavity which is intended to accommodate a solid or liquid substance and is separated from the first cavity by a partition that can be opened by the gas-pressurized liquid, or that the partition between the said first cavity and said second cavity is a circumferential wall which completely surrounds the second cavity or that the second cavity has the shape of a cylinder or that is symmetrical in relation to an axis (x), and said first cavity has the shape of a cylindrical sleeve.

Reichinger discloses a two compartment container for use in a beverage container wherein two products remain separate until the moment the customer wishes to consume the mixture which ensures that the mixture is fresh (Page 1, Para 1), comprising a compartment filled with flavor (i.e. a second cavity intended to accommodate a liquid substance separated from the first cavity), comprising an inner side wall separates that flavor containing compartment preventing gas or fluid from escaping, and a weak closure means between the inner sidewall and the opposite part of the two compartment container so that upon opening, the inner sidewall is released

and the flavor can escape (the partition between the said first cavity and said second cavity is a circumferential wall which completely surrounds the second cavity; partition that can be opened by the gas-pressurized liquid) (Page 4, Para 2, Fig. 1a and 1b). It is clear from figures 1a and 1b that the inner sidewall is in the shape of a cylinder and the outer sidewall is in the shape of a cylindrical sleeve surrounding the inner sidewall (the second cavity has the shape of a cylinder or that is symmetrical in relation to an axis (x), and said first cavity has the shape of a cylindrical sleeve) (Fig. 1a, 1b).

Nash and Reichinger are analogous art because they both teach about capsules which are activated by pressure located in beverage cans. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to incorporate the compartment filled with flavor and the inner sidewall of Reichinger into the first compartment of the capsule of Nash to provide a capsule with the advantage of being able to provide a flavor to the beverage wherein two products remain separate until the moment the customer wishes to consume the mixture which ensures that the mixture is fresh.

Given that Nash discloses that the capsules are inserted in containers the can is dosed with liquid nitrogen and the lid is affixed and sealed, the cans have been previously filled with beverage (C6/L39-45; C7/L23-26), the capsule is used to create a head on a beverage such as beer (C1/L4-7), the interior of the capsule will be pressurized by gas in the headspace above the liquid and the trapped gas is able to exit the capsule when the container is opened and the pressure in the container drops (C2/L26-33) and given that Reichinger discloses that his capsule is precharged to a

pressure above atmospheric and inserted into the container and the container is filled with a liquid (Page 2, Para3), it is the Examiner's position that modified Nash discloses use of the capsule wherein the second cavity is filled with the liquid substance, the open container is filled with liquid, the capsule insert is introduced into the container after the liquid is filled into the container and the liquid container is sealed such that overpressure develops compared to the ambient pressure after the liquid container is sealed.

Given that Nash discloses that the capsules are inserted in containers the can is dosed with liquid nitrogen which pressurizes the can after it is sealed (i.e. wherein said overpressure is admitted into the headspace) (C3/L64-67), it is the Examiner's position that the overpressure is admitted into the headspace.

Given that the liquid in modified Nash is beer (carbonated beverage) (C1/L4-7) and the substance stored in modified Nash is a flavor compound, it is the Examiner's position that the liquid is beer and the solid or liquid is an aroma compound. Nash further discloses that the can is dosed with liquid nitrogen (i.e. filled with the addition of liquid nitrogen) (C3/L64-67).

14. Claims 15 and 17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Nash et al. (US 5,714,186), in view of Wright et al. (US 5,705,209).

Regarding claims 15 and 17, Nash discloses all of the claim limitations as set forth above. It is noted that the reference teaches a capsule with a bottom (i.e. bottom part) and a top (i.e. cover part) and a weight (Fig. 1 and 2). Given that the top and bottom of the capsule of Nash are a cover part and a bottom part, it is the Examiner's

position that the cover part and bottom part comprise all said sidewalls (i.e. at least one of said cover part and said bottom part has all the said sidewalls of the insert).

Nash does not disclose that the bottom part and the top part are connected to one another via snap connections or a frictionally engaged connection or that the top and bottom of the capsule snappingly engage each other or extend around structures arranged there during connection.

Wright discloses an insert for a beverage container (C3/L5-10) having a top part and a bottom part which snappingly engage each other (Fig. 4).

Nash and Wright are analogous art because they both teach about inserts for a beverage container. Therefore, it would have been obvious to one of ordinary skill in the art to incorporate the snapping engagement design to connect the top and bottom portion of the capsule of Nash to provide a capsule that can be opened and closed easily so that components (such as the weight) can be easily placed inside the capsule.

15. Claims 1-6, 10-14, 16 and 18-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Houzego et al. (WO 95/04688).

Regarding claims 1, 2, 5, 6, 11-14, 16 and 18-21, Houzego discloses a head generating device for use in a sealed and pressurized container which is partially filled with liquid (i.e. insert for being added to a gas-pressurized liquid in a liquid container, the liquid container also having a headspace adjacent to the gas-pressurized liquid), comprising a hollow capsule having a ballast means such that the capsule will float of the liquid wherein liquid can enter the uppermost compartment (i.e. positioning device that is associated with said body) (Page 2, Para 6 – Page 3, Para 2), and having a

lower compartment (i.e. body that is activated by pressure having at least one cavity) (Page 11, Para 1, Fig. 1).

Given that the interior of the capsule is pressurized by gas in the headspace and exits the capsule when the container is opened and the pressure in the container drops, it is the Examiner's position that the lower compartment can be activated by pressure (Page 1, Para 2). Houzego further discloses that a small opening (bottom of tube 22, Fig. 1) connects the lower compartment (i.e. body; cavity) with the headspace (at least one opening that connects said at least one cavity with the headspace of the liquid container) (Fig. 1).

While Houzego does not disclose that the body is cylindrical or that the positioning device is cylindrical, change in size and shape is not patently distinct over the prior art absent persuasive evidence that the particular configuration of the claimed invention is significant. See *In re Rose*, 220 F.2d 459, 105 USPQ 237 (CCPA 1955); *In re Rinehart*, 531 F.2d 1048, 189 USPQ 143 (CCPA 1976); *In re Dailey*, 357 F.2d 669, 149 USPQ 47 (CCPA 1966). MPEP 2144.04[R-1].

Houzego further discloses wherein the upper compartment (i.e. positioning device comprising a floating body) has a small opening 16 that is submerged in the liquid when the capsule is placed on a liquid (an opening that is submerged in the gas-pressurized liquid when the insert is floating on the gas-pressurized liquid) and an opening 23 (i.e. ventilation opening that directly communicates with the headspace) (Fig.1), wherein the upper compartment fills with liquid, when the upper compartment is half full, the buoyancy of the capsule is reduced such that it will no longer float (i.e.

minimum volume which ensures that the insert will sink into the liquid when it is filled with liquid) (Page 11, Para 2).

It is the Examiner's position that given that the upper and lower compartments are adjacent to each other, the upper compartment (positioning device) is arranged outside the lower compartment (body).

Given that the lower compartment (body) is attached to the bottom of the upper compartment (positioning device), it is the Examiner's position that the bottom of the lower compartment (body) and the bottom of the upper compartment (positioning device) form an integral unit.

Given that the lower compartment (body) has only one cavity and only one small opening (bottom of tube 22, Fig. 1) connects the lower compartment (i.e. body; cavity) with the headspace (at least one opening that connects said at least one cavity with the headspace of the liquid container) (Fig. 1), it is the Examiner's position that the capsule meets the limitations of claim 6.

Given that the upper and lower compartments are roughly shaped like equal halves of the capsule, it is the Examiner's position that they are designed as symmetrical bodies in relation to an axis.

Houzeago discloses that the capsule comprises a weight whose mass is selected appropriately so that when the upper compartment is half full, the buoyancy of the capsule is reduced such that it will no longer float (i.e. further comprising a weight positioned within said cavity of said body) (Page 11, Para 2, Fig. 1, 17).

Given that the weight is attached to the structure of the capsule, it is the Examiner's position that the weight is an integral part of the body.

Regarding claims 14 and 16, it is noted that the reference teaches a lower compartment having a bottom (i.e. bottom part) and an upper compartment having a top (i.e. cover part) and a weight (Fig. 1). Given that the shell of the capsule (Fig. 1, 14) comprises the walls of the upper and lower compartments, it is the Examiner's position that the bottom and top are connected to one another via the side walls thereof.

Regarding claim 18, given that when the upper compartment is half full, the buoyancy of the capsule is reduced such that it will no longer float (Page 11, Para 2), it is the Examiner's position that it would have been obvious to one of ordinary skill in the art at the time the invention was made to make the body and the positioning device of a material with a specific gravity of >1 to further promote submerging the capsule.

Regarding claims 19-21, Houzego discloses that the interior of the capsule is pressurized by gas in the headspace and exits the capsule when the container is opened and the pressure in the container drops, creating a head on the beverage (i.e. use of an insert to improve the formation of gas bubbles in a gas-pressurized liquid during the opening of the container wherein the insert is introduced into the container before or after the open container is filled with liquid, and the liquid container is sealed, such that an overpressure develops compared to the ambient pressure within the liquid container after the sealing) (Page 1, Para 2). Houzego discloses that the headspace contains pressurized nitrogen gas (i.e. wherein said overpressure pressure which is admitted into said headspace of the liquid container) (Page 10, Para 1). Houzego

discloses that the capsule can be used in the production of head on a beer (i.e. wherein the liquid is a foaming beverage) (Page 1, Para 1).

Regarding claims 3 and 4, It is the Examiner's position that given that the upper compartment has a covered top part, the upper compartment has the shape of an upwardly at least partially covered boat, and that the upper compartment (positioning device) comprises a bottom and a circumferential sidewall (Fig. 1).

Regarding claim 10, It is the Examiner's position that given that the upper and lower compartments comprise equal halves adjacent to each other, that the lower compartment (body) is arranged centrally to the floating body.

Houzeo does not disclose that the body is arranged in the positioning device.

However, since it has been held that rearranging parts of an invention involves only routine skill in the art while the device having the claimed dimensions would not perform differently than the prior art device, In re Japikse, 86 USPQ 70, it is the Examiner's position that it would have been obvious to arrange the body that can be activated by pressure in or within the floating body and on the bottom of the floating body and the capsule would not perform differently.

16. Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over Houzeo et al. (WO 95/04688) as applied to claim 1 above, in further view of Grieshaber et al. (US 1,567,050).

Regarding claim 10, It is the Examiner's position that given that the upper and lower compartments comprise equal halves adjacent to each other, that the lower compartment (body) is arranged centrally to the positioning device.

Houzezo does not disclose that the body is arranged in the floating body.

Grieshaber discloses that conventionally submarines have ballast tanks along the hull, and are positioned around the outside of the inner compartment as shown in figure 1 (P1/L18-29, Fig. 1).

Houzezo and Grieshaber are analogous art because they both teach about structures that float on and submerge in liquids. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to use the design of Grieshaber regarding the placement of the lower compartment in or within the upper compartment in the capsule of Houzezo because that is the conventional design used in submersible devices and to provide increased stability to the structure.

17. Claims 7-9 and 22-25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Houzezo et al. (WO 95/04688), in view of Reichinger (WO 99/54229).

Regarding claims 7-9 and 22-25, Houzezo discloses all of the claim limitations as set forth above. It is the Examiner's position that the cavity of the lower compartment (body) is the first cavity and the small opening (bottom of tube 22, Fig. 1) is the said at least one opening in an upper surface thereof.

Houzezo does not disclose a second cavity which is intended to accommodate a solid or liquid substance and is separated from the first cavity by a partition that can be opened by the gas-pressurized liquid, or that the partition between the said first cavity and said second cavity is a circumferential wall which completely surrounds the said second cavity or that the second cavity has the shape of a cylinder or that is

symmetrical in relation to an axis (x), and the said first cavity has the shape of a cylindrical sleeve.

Reichinger discloses a two compartment container for use in a beverage container wherein two products remain separate until the moment the customer wishes to consume the mixture which ensures that the mixture is fresh (Page 1, Para 1), comprising a compartment filled with flavor (i.e. a second cavity intended to accommodate a liquid substance separated from the first cavity), comprising an inner side wall separates that flavor containing compartment preventing gas or fluid from escaping, and a weak closure means between the inner sidewall and the opposite part of the two compartment container so that upon opening, the inner sidewall is released and the flavor can escape (separated from the first cavity by a wall that can be opened by relatively weak forces; the partition between the two said cavities is a circumferential wall which completely surrounds the said second cavity; partition that can be opened by the gas-pressurized liquid) (Page 4, Para 2, Fig. 1a and 1b). It is clear from figures 1a and 1b that the inner sidewall is in the shape of a cylinder and the outer sidewall is in the shape of a cylindrical sleeve surrounding the inner sidewall (the second cavity has the shape of a cylinder that is symmetrical in relation to an axis (x), and the said first cavity has the shape of a cylindrical sleeve) (Fig. 1a, 1b).

Houzeago and Reichinger are analogous art because they both teach about capsules which are activated by pressure located in beverage cans. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to incorporate the compartment filled with flavor and the inner sidewall of Reichinger

into the lower compartment of the capsule of Houzego to provide a capsule with the advantage of being able to provide a flavor to the beverage wherein two products remain separate until the moment the customer wishes to consume the mixture which ensures that the mixture is fresh.

Given that Houzego discloses that the interior of the capsule is pressurized by gas in the headspace and exits the capsule when the container is opened and the pressure in the container drops, creating a head on the beverage (Page 1, Para 2) and given that Reichinger discloses that his capsule is precharged to a pressure above atmospheric and inserted into the container and the container is filled with a liquid (Page 2, Para3), it is the Examiner's position that modified Houzego discloses use of the capsule wherein the second cavity is filled with the liquid substance, the open container is filled with liquid, the capsule insert is introduced into the container before the liquid is filled into the container and the liquid container is sealed such that overpressure develops compared to the ambient pressure after the liquid container is sealed.

Given that Houzego discloses that the headspace contains pressurized nitrogen gas (i.e. wherein said overpressure is admitted into the headspace) (Page 10, Para 1), it is the Examiner's position that the overpressure is admitted into the headspace.

Given that the liquid in modified Houzego is beer (carbonated beverage) (Page 1, Para 1) and the substance stored in modified Houzego is a flavor compound, it is the Examiner's position that the liquid is beer and the solid or liquid substance is an aroma compound. Houzego further discloses that the headspace can be dosed with liquid nitrogen (i.e. filled with the addition of liquid nitrogen) (Page 15, Para 6).

18. Claims 15 and 17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Houzego et al. (WO 95/04688), in view of Wright et al. (US 5,705,209).

Regarding claims 15 and 17, Houzego discloses all of the claim limitations as set forth above. It is noted that the reference teaches a lower compartment having a bottom (i.e. bottom part) and an upper compartment having a top (i.e. cover part) and a weight (Fig. 1). Given that the top and bottom of the capsule of Houzego are a cover part and a bottom part, it is the Examiner's position that the cover part and bottom part comprise all said sidewalls (i.e. at least one of said cover part and said bottom part has all the said sidewalls of the insert).

Houzego does not disclose that the bottom part and the top part are connected to one another via snap connections or a frictionally engaged connection or that the top and bottom of the capsule snappingly engage each other.

Wright discloses an insert for a beverage container (C3/L5-10) having a top part and a bottom part which snappingly engage each other (Fig. 4).

Houzego and Wright are analogous art because they both teach about inserts for a beverage container. Therefore, it would have been obvious to one of ordinary skill in the art to incorporate the snapping engagement design to connect the top and bottom portion of the capsule of Houzego to provide a capsule that can be opened and closed easily so that components (such as the weight) can be easily placed inside the capsule.

Response to Arguments

19. Applicant's arguments with respect to claims 1-25 have been considered but are moot in view of the new ground(s) of rejection.

20. Applicant's arguments filed 26 October 2009 have been fully considered but they are not persuasive.

Applicant argues that Houzego discloses a complicated system of tubes and a valve that are associated with a body that does not employ three distinct openings.

Regardless of whether Houzego discloses a complicated system of tubes and a valve, it is clear as set forth above that the device of Houzego meets the limitations of the claims.

In response to Applicant's argument that the references fail to show certain features of Applicant's invention, it is noted that the features upon which applicant relies (i.e., not having tubes or a valve) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

Applicant argues that Houzego/Nash and Grieshaber are nonanalogous art and that one concerned with beverage container inserts would not look to a balast tank for inspiration.

Applicant is reminded that according to MPEP 2141.01 (a), a reference may be relied on as a basis for rejection of an applicants' invention if it is "reasonably pertinent

to the particular problem with which the inventor is concerned." A reasonably pertinent reference is further described as one which "even though it maybe in a different field of endeavor, it is one which, because of the matter with which it deals, logically would have commended itself to an inventor's attention in considering his problem."

Grieshaber is, therefore, a reasonably pertinent reference, because it teaches about devices which float on and submerge in liquid, which is a function especially pertinent to the invention at hand.

Applicant argues that Nash does not teach every limitation of claim 1.

Applicant's argument is not persuasive because applicant does not set forth why he believes that Nash does not teach every limitation of claim 1.

Applicant's argument is not persuasive because it is clear as set forth above that the device of Nash meets the limitations of the claims.

Applicant's arguments fail to comply with 37 CFR 1.111(b) because they amount to a general allegation that the claims define a patentable invention without specifically pointing out how the language of the claims patentably distinguishes them from the references.

Conclusion

21. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP

§ 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

22. Any inquiry concerning this communication or earlier communications from the examiner should be directed to JAMES YAGER whose telephone number is (571)270-3880. The examiner can normally be reached on Mon - Fri, 7:30am-5pm, EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Rena Dye can be reached on 571 272-3186. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

JY 2/25/10

/Rena L. Dye/
Supervisory Patent Examiner, Art Unit 1794